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IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-1323

Norfolk and Western Railway Company,
Petitioner,

vs.

Kandythe J. Liepelt, Administratrix
of the Estate of Delroy Liepelt, Deceased,
Respondent.

On Writ of Certiorari to the Appellate Court of Illinois, First District, First Division

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Appellate Court of Illinois, First District, First Division, is reported at 62 Ill.App.3d 653, 378 N.E.2d 1232 (1978), and it appears at pages A21–A26 of the Petition For Certiorari. The order and mandate of the Supreme Court of Illinois denying Petitioner's Petition for Leave to Appeal, unreported, appears at pages A27–A28 of the Petition For Certiorari.

JURISDICTION

The judgment of the Appellate Court of Illinois, First District, First Division, was entered on July 5, 1978. Petitioner's timely Petition for Leave to Appeal was denied by the Supreme Court of Illinois on November 30, 1978. The

Petition for Certiorari was timely filed on February 26, 1979 and was granted on April 16, 1979. (A 91) The jurisdiction of this Court is based on 28 U.S.C. §1257(3).

STATUTES INVOLVED

35 Stat. 65, *as amended,* 45 U.S.C. §51.

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

26 U.S.C. §61(a), Int. Rev. Code of 1954, §61(a).

"[G]ross income means all income from whatever source derived. . . ."

26 U.S.C. 104(a)(2), Int. Rev. Code of 1954, §104(a)(2).

"[N]ot in the case of amounts attributable to (and not in excess of) deductions allowed under Section 213 (relating to medical, etc., expense) for any prior taxable year, gross income does not include—. . . (2) the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness. . ."

QUESTIONS PRESENTED

The measure of damages in wrongful death actions under the Federal Employers' Liability Act (FELA) is the amount that the decedent's statutory beneficiaries could reasonably have expected to have been applied to their benefit if the accident had not occurred. This case presents two questions concerning whether a court's refusal to permit the trier of fact to consider the effect of income taxation violated this basic principle of damages:

1. Whether, in a case in which income taxation would have substantially reduced the income available to the decedent if the accident had not occurred, a court must allow evidence of the income taxes that the decedent would have paid on his estimated past and future lost earnings and require the jury to reduce the award to account for the effects of taxation?

2. Whether, in view of the likelihood that a jury otherwise would erroneously assume that a damages award is taxable and thus inflate its verdict to assure full compensation after payment of an imagined tax, the trial court in a FELA action should permit the jury to be informed that, under existing tax laws, the damages award is not subject to income taxation?

STATEMENT OF THE CASE

In November, 1973, Delroy Liepelt, an Ohio resident, was killed in a collision at Wyatt, Indiana, while working as a fireman for the petitioner railway company. Respondent, the

administratrix of his estate, brought this action under the FELA in the Circuit Court of Cook County, Illinois, to recover the monetary damages that she and Liepelt's children had incurred as a result of his death.

At trial, respondent introduced evidence both of petitioner's negligence—which is no longer in issue[1]—and of the pecuniary loss that she and decedent's children had incurred because of his death. The only evidence concerning the dollar value of the pecuniary loss suffered by decedent's wife and children was supplied by respondent's witness, Dr. Bernard Friedman, an economist. (A46–A61). Liepelt had been earning approximately $13,000 per year at the time of his death in 1973, and his annual earnings as a railroad fireman would have increased to approximately $16,800 by the date of the trial in 1977. (A43–A44, A52–A53). Friedman testified that Liepelt had had a life expectancy of a little over 34 years at the time of his death in 1973 (A46), and on the basis of the historical wage tendencies of the preceding 20 years (which reflected inflation) (A47–A50), Friedman projected that decedent's earnings would have increased in the future at a rate of at least 5% per year (A54–A55), thus reaching an annual estimated salary of some $51,600 by the date of decedent's projected retirement in the year 2000.[2]

[1]The fatal accident occurred because the train on which decedent was working switched onto a siding track and collided with several loaded freight cars. Although evidence showed that vandals broke the lock on the switch and thereby caused the accident, the court below held that there was sufficient evidence to permit the jury to find that vandalism was not the sole cause of the accident. (Petition for Certiorari, at A5, A18–A19).

[2]Witness Friedman also calculated that petitioner's contributions to health insurance, disability plans, and so forth had a value of 5% of decedent's gross pay, so he increased the lost earnings figure by this 5%. (A54–A55).

The second major element in witness Friedman's computation consisted of determining the value of the chores decedent would have performed around his house over the period of his life expectancy if he had survived. After stating that it was difficult to assign a monetary value to these (A55), Friedman testified that decedent's household services would, for any given year, have had a value equal to 9% of his annual gross income. (A55).

The final element in the computation consisted of a determination of the amounts decedent would have spent on himself over his life time. On the basis of the prior testimony, Friedman estimated that Liepelt had spent approximately 10% of gross earnings on himself during the years immediately prior to his death. Friedman, however, projected, that these amounts would have increased over his lifetime to 25% and later to 50% of his gross earnings and that the "weighted average" for those personal expenditures would have been 31% of his gross income for the later years of his life. (A55–A56).

To determine the monetary value of the net pecuniary loss to decedent's beneficiaries, witness Friedman first discounted lost future benefits to their present value, using an interest rate of 7%.[3] He then added the present value of Liepelt's past and projected gross compensation to that of his household services and then subtracted the value of the amounts Liepelt would have spent on personal consumption, producing the amount of $302,000. (A54). Finally, although there had been testimony concerning the care, guidance, instruction,

[3]Friedman had earlier testified that, in light of the historical evidence and the present tendencies, 7% was an appropriate rate. (A51).

and training that Liepelt would have provided his children if he had not been killed (A17–A26, A28–A31), witness Friedman testified that this figure of $302,000 did not include any amount to reflect these losses because he could not assign any monetary value to them, there being no statistical basis for doing so. (A59–A60).

Prior to calling witness Friedman, respondent's counsel had made an oral motion to prohibit petitioner from mentioning the subject of income taxation in its cross examination. (A44). When counsel for petitioner asked to question witness Friedman as to whether he had taken into account in his computations that any amount paid in damages is not subject to income tax, the trial judge prohibited the questioning, saying that, under the decisions of the Illinois Supreme Court, any reference to income taxation in the presence of the jury not only would be improper but would require "granting a motion for a mistrial." (A61–A63).

After witness Friedman was excused, petitioner moved for a mistrial on two related grounds. First, petitioner again argued that the jury should be informed that any damages awarded would not be taxable. Second, petitioner urged that it should be allowed to introduce into evidence the amounts of decedent's gross earnings which would have been paid out in income taxes and which, therefore, could not have been used to support his beneficiaries if the fatal accident had not occurred. The trial judge, however, reaffirmed the earlier ruling that any reference to income taxation was impermissible. (A63–A75).

In light of the trial court's rulings, petitioner could not, during the presentation of its case, place before the jury any evidence concerning the effect of income taxation on either the award or the estimated earnings of the decedent. However, petitioner did make an offer of proof that, but for the trial judge's rulings, petitioner would have called as a witness an actuary, Dr. Robert Barnes, who would have testified that in determining the pecuniary loss to decedent's survivors, he would have reduced the decedent's lost earnings by $57,000 for income taxation during the period from 1973 to 2000 and that, using a discount rate of 6%, he would have arrived at a net pecuniary loss of $115,325. The offer of proof further provided that if Dr. Barnes had assumed a 5% annual increase in future earnings, he would have used a discount rate of 8¾% and arrived at a net pecuniary loss of $138,327.[4] (A75–A76).

At the close of the evidence, petitioner requested that the judge instruct the jury that its award would not be taxed and that no amount should be added to the award on account of taxation, but the court refused, relying on its earlier rulings. (A82, A87). In his instructions to the jury, the judge stated that it must "fix the amount of money which will reasonably and fairly compensate the survivors of the decedent for [their] pecuniary loss[es]." (A83). The jury was told that in doing so it should determine what benefits the decedent might reasonably have been expected to have contributed to each beneficiary if the decedent had not met his death. (A84). In making that latter determination, the jury was instructed to consider "what the decedent was earning and what he would have been likely to earn in the future" and also "the personal expenses of decedent and other deductions from his earnings." (A83–A84). The judge further instructed that the jury could compensate decedent's children for loss of guidance but could not award any sum for "grief or loss of

[4]The trial judge stated that, in light of his earlier rulings, it would not have been possible to place this information before the jury, but that the offer of proof was "very properly made." (A76).

society and companionship." (A84). The jury returned a verdict of $775,000 (A88), and judgment was entered in that amount (A89, A90).

Petitioner appealed to the Illinois Appellate Court, First District, First Division. Petitioner there contended that the income tax related rulings of the trial court constituted reversible error. First, petitioner urged that where, as in this case, taxation would have significantly reduced a decedent's disposable income, it was a violation of the FELA to refuse to permit the introduction of evidence of the amount of income taxes that would have been paid. Second, petitioner contended that the FELA required that the jury be told that the damages awarded a plaintiff are not subject to taxation. The Illinois Appellate Court held against petitioner on both points, stating in its opinion:

> "Defendant also claims as error the trial court's refusal to instruct the jury as to the nontaxability of a damage award; to allow cross-examination of plaintiff's economist as to the nontaxability of an award; and, to allow defendant to introduce evidence as to the effects of income taxes on the decedent's future earnings. Numerous federal cases have been cited by defendant and *amicus* American Trial Lawyers Association. From a review of these cases it is apparent that the Courts of Appeals differ on the question of whether it is proper to instruct the jury as to the nontaxability of an award or to allow evidence as to the effects of taxation on future earnings. Compare *Burlington Northern Inc.* v. *Boxberger* (9th Cir. 1975), 529 F.2d 284, with *Johnson* v. *Penrod Drilling Co.* (5th Cir. 1975), 510 F.2d 234, *cert. denied*, 423 U.S. 839.
>
> "The Supreme Court of the United States has not spoken on this issue. Absent an authoritative pronouncement by that Court we will follow the decisions of our own supreme court in *Raines* v. *New York Central R.R. Co.*, (1972), 51 Ill.2d 428, 430, 283 N.E.2d 230, *cert. denied*, 409 U.S. 983, and *Hall* v. *Chicago & Northwestern Ry. Co.* (1955), 5 Ill.2d 135, 149–52, 125 N.E.2d 77, cited in *Saunders* v. *Norfolk & Western Ry. Co.* (1977), 54 Ill.App.3d 307, 316, 369 N.E.2d 518. These decisions hold that it is not error to refuse to instruct a jury as to the nontaxability of an award. Based on these decisions we also conclude that it is not error to exclude evidence of the effect of income taxes on future earnings of the decedent. These contentions are therefore rejected." (Petition for Certiorari A22–A23).

After the Appellate Court denied petitioner's Application for a Certificate of Importance, petitioner filed a Petition for Leave to Appeal with the Illinois Supreme Court which made the same arguments concerning the consideration of income taxation that had been rejected by the Illinois Appellate Court. That Petition was denied by the Illinois Supreme Court on November 30, 1978. (Petition for Certiorari A27–A28). A timely petition for a writ of certiorari was filed on February 26, 1979, and this Court granted the petition on April 16, 1979. (A91).

SUMMARY OF ARGUMENT

Consistent with the terms and objectives of the Federal Employers' Liability Act, this Court has long held that damages in wrongful death actions brought under the Act are limited to the value of the pecuniary loss that the decedent's dependent relatives suffered by reason of his death. *Michigan Central R.R. Co.* v. *Vreeland*, 227 U.S. 59, 68–74 (1913). Employers, like petitioner, thus have a federal right to have FELA damages computed under a method that will provide the FELA claimants with full compensation for their losses, *but no more*. *Gulf, Colorado & Santa Fe R. Co.* v. *McGinnis*, 228 U.S. 173, 176 (1913). The rulings below of the Illinois courts violated this right in two separate respects.

First, the Illinois courts' refusal to permit the introduction of evidence of the substantial income taxes the decedent would have paid on his estimated gross earnings guaranteed that the claimants received substantially more than the value of the loss they suffered.

Wrongful death damages are intended to compensate the decedent's relatives for the loss of financial support from the decedent. Accordingly, it is an essential part of the computation of these damages that a deduction be made from the decedent's gross earnings for all amounts that the decedent would not or could not have contributed to those beneficiaries. *Kansas City Southern Ry.* v. *Leslie*, 238 U.S. 599, 604 (1915). Plainly, the taxes the decedent would have paid on his earnings could no more have been used to support his wife and children than could, for example, the amounts decedent would have spent on himself. So just as the FELA requires a deduction for the amount of a decedent's personal expenditures, so too it must require a deduction for the taxes he would have paid on his earnings. To require a jury to award these sums to the respondent is, quite simply, to confer a windfall on the claimant and to contravene the principle that FELA damages are to be compensatory, not punitive.

The arguments advanced to support the Illinois practice of awarding wrongful death claimants the taxes the decedent would have paid on his earnings are all unpersuasive. The contention that the effects of taxation on future earnings are too speculative to be estimated by a jury is wholly unrealistic. Income taxes have been a significant fact of life for the average wage earner for decades, have been in effect since decedent's death in 1973, and the continuation of income taxation is as certain as any of the other factors involved in the determination of the value of a decedent's beneficiaries' loss.

Indeed, in light of the instability of family relationships and the possibility of death from natural causes, predictions concerning future taxation involve less speculation than those other predictions inherent in a determination of the support a decedent would have provided his dependent relatives if he had survived. Nor can it plausibly be argued that the determination of tax liability is too difficult for a jury. The rule limiting damages to the value of losses sustained already requires far more difficult computations—the reduction of the award to present value, for example—and juries routinely make more complicated determinations in other contexts. Because nearly every juror will have had personal experience computing tax liability, it is certain that, with the aid of such expert testimony as may be received, juries will be equal to the task of adjusting the size of the award to account for taxation.

Nor is there any merit to the suggestion that refusal to consider income taxation is justifiable because it will be offset by two factors juries do not consider: attorney fees and future inflation. As to inflation, its effects were taken into account here, for the jury was told that half of the projected increases in decedent's future wages would be adjustments for inflation. As to a plaintiff's attorney fees, these not only have no relevance to the measure of FELA damages, but courts are precluded, absent specific legislative guidance not present in the FELA, from allowing a jury to include in the award any amount to reimburse the plaintiff for these litigation costs. *See Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240, 247–250 (1975).

The claim that Internal Revenue Code §104(a)(2) impliedly repealed the rule limiting FELA wrongful death damages to losses sustained is untenable. Apart from the fact that §104(a)(2) is inapplicable to wrongful death awards, all this statute does is provide that after an award is determined

according to traditional damage principles, it will be tax free. It has nothing whatsoever to do with the measure of tort damages.

Logic and fairness thus require a rule making the amount of a decedent's income tax liability a relevant consideration. Here, petitioner demonstrated that income taxation would have had a significant effect on the decedent's income. Whatever might be the appropriate rule in cases in which the impact of income taxation would have been less substantial, there is no basis whatsoever for a rule precluding consideration of income taxes where, as here, it would have substantially reduced the decedent's disposable income. The exclusion of the evidence of income tax liability thus requires a reversal.

Second, the Illinois courts' refusal to permit the jury to be told that its award would be tax free created a separate and entirely independent risk that the award, in this case, overcompensated respondent.

The jury was here instructed that it was to "fix the amount of money which will reasonably and fairly compensate the survivors of the decedent for their pecuniary loss[es]." Because a jury could easily interpret this instruction as a directive to ensure that the award will provide the claimants with such an amount of *disposable* income as will fully compensate them, a jury will, in following this instruction, be concerned with the question whether the award will be taxed.

When the court refuses—as it did here—to allow the jury to be advised that its award will not be taxed, it creates a significant risk that the jury will award the claimants not only the amount of their losses but also, in addition, the amount of taxes that would have been paid on the award if it had

been taxable. For absent instructions to the contrary, the jury will almost certainly assume that a wrongful death award, like all other receipts of money, will constitute income to the recipient that will be taxed in the year received. Because it is probable it will also want the beneficiaries to *receive* full "after tax" compensation, it is very likely the jury will add to the award an amount that will make it big enough to ensure full compensation after payment of an imaginary tax.

The facts of this case suggest that precisely this occurred here, for respondent received an award of $775,000 after her own expert testified that the net pecuniary loss to decedent's beneficiaries was $302,000 plus whatever value was assigned to lost care and guidance. Because there was no reason whatsoever not to have instructed the jury that its award was tax free and because the failure to give this instruction created a significant risk that the jury would have overcompensated the claimant, the principles that govern FELA actions compel the reversal of the judgment on this ground. *See Michigan Central R.R. Co.* v. *Vreeland*, 227 U.S. 59, 68–74 (1913).

ARGUMENT

Although our Nation has had a graduated income tax since 1913, the question of the treatment of income taxation in measuring tort damages had been largely an academic one until comparatively recently. In the first half century of income taxation, it was the rare case in which resolution of these tax questions would have had a significant effect on the size of any claimant's judgment. Employees' wages were generally too low to be taxed, and even when subject to taxation, the amounts involved were so minimal that consideration of income taxation was unlikely to be a major factor in the computation of damages awards.

When these questions were first presented in state and federal courts in the 1940's and early 1950's, the initial judicial reaction was thus adverse: courts believed that the impact of taxation simply could not be so great as to warrant complicating a trial, even slightly, on its account. But those holdings, in many courts, proved short lived. In recognition of the facts that wages have increased steadily, without any corresponding upward adjustment in tax schedules, and that taxation thus has become a significant factor for nearly every wage earner, these courts began analyzing the issue under traditional principles of damages and concluded that income taxation had to be taken into account in computing tort damages.[5]

This case is before this Court because there are courts, like those of Illinois, which have refused to deviate from prior holdings and which continue to hold that income taxation is an improper consideration in any case based on negligence.[6] In this brief, petitioner will demonstrate that the refusal to permit consideration of the effects of income taxation in actions arising under the FELA violates the principles that have always governed the determination of FELA damages. In the first section of this brief, petitioner will show that it

[5] *See, e.g., British Transport Comm'n v. Gourley,* [1956] A.C. 185, 3 All. E.R. 796, *overruling Billingham v. Hughes,* [1949]. 1 K.B. 643, 9 All. E.R. 684; *Burlington Northern, Inc. v. Boxberger,* 529 F.2d 284 (9th Cir. 1975), *distinguishing Southern Pacific Co. v. Guthrie,* 186 F.2d 926 (9th Cir. 1954); *LeRoy v. Sabena Belgian World Airlines,* 344 F.2d 266, 276 (2d Cir. 1965), *overruling sub silentio Stokes v. United States,* 144 F.2d 82, 87 (2d Cir. 1944); *Dempsey* v. *Thompson,* 363 Mo. 339, 251 S.W.2d 42 (1952), *overruling Hilton* v. *Thompson,* 360 Mo. 177, 227 S.W.2d 675 (1950).

[6] *See, e.g., Boston & Maine R. R. v. Talbert,* 360 F.2d 286, 291 (1st Cir. 1966); *Chicago & N.W. Ry. Co. v. Curl,* 178 F.2d 497, 502 (8th Cir. 1949); *Rediker v. Chicago, R.I. & P.R.R.,* 1 Kan.App.2d 581, 571 P.2d 70 (1977), *cert granted,* 435 U.S. 922 (1978) dismissed pursuant to S. Ct. Rule 60; *see generally* Annot., 63 A.L.R.2d 1393, 1398 (1959) and later cases in A.L.R.2d Supp. Service.

has a federal right to have the FELA damages it pays determined under a method that will produce an award that is limited to the value of the claimant's losses. In the second and third sections of the brief, petitioner will show that this right was violated in two respects in this case. First, by excluding all evidence of the taxes decedent would have paid on his estimated gross earnings, the Illinois court required the jury to award respondent amounts which never would have been contributed to decedent's wife and children if there had been no accident. Second, by refusing to permit the jury to be told that its award would not be taxed, the Illinois court created a significant risk—which obviously came to fruition in this case—that the jury would award respondent not only the value of the beneficiaries' losses, but also, in addition, the amount of the taxes that would have been payable on the award if it had not been tax free.

I. THE FEDERAL EMPLOYERS' LIABILITY ACT REQUIRES THAT STATE, AS WELL AS FEDERAL, COURTS "STRICTLY LIMIT" RECOVERIES IN WRONGFUL DEATH ACTIONS TO THE VALUE OF THE DECEDENTS' BENEFICIARIES' LOSSES

The Federal Employers' Liability Act was enacted to redistribute the losses suffered by railroad employees as a result of negligent acts of their employers or fellow employees.[7] It

[7] Prior to the Act, the common law doctrines of assumption of risk, contributory fault, and the fellow servant rule had drastically limited the instances in which a railroad could be held liable to any of its employees in negligence. *See* Sen. Rep. No. 460, 60th Cong., 1st Sess. 1-3 (1908). The Act either restricts or abolishes each of these common law defenses, thus expanding the conditions under which railroads may be held liable in damages. In addition to granting

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grants railroad employees, and their beneficiaries, a federal right to recover "damages" from their employers for injuries or deaths caused, "in whole or in part [by] the negligence of any of the [railroad's] officers, agents, or employees." 35 Stat. 65, *as amended* 45 U.S.C. §51. Although the FELA does not explicitly define "damages" in its wrongful death actions,[8] the Act's terms and history establish that such damages must be assessed in accordance with the fundamental principle that damages in actions based on negligence be limited to such a sum as will compensate the claimants for their losses.[9] *See* C. McCormack, *Law of Damages* 560 (1935).

Congress modeled the FELA's wrongful death provisions on the English wrongful death statute known as Lord Campbell's

injured employees a right of recovery for negligently inflicted injuries, the Act extends railroads' liability to cases of death. It provides that the personal representative of a deceased employee may bring an action to recover on behalf "of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee." 35 Stat. 65, *as amended,* 45 U.S.C. §51. The case at bar involves such a "wrongful death" action.

[8]Because this case involves the FELA's wrongful death provisions, the discussion in this brief will focus upon this Court's decisions concerning the calculation of FELA wrongful death awards. However, because the principle of compensation is equally applicable to all actions brought under the FELA, the reasoning here applies with the same force to nondeath cases.

[9]The legislative history of the Act makes it explicit that Congress had no intention of increasing the financial burdens on railroads beyond requiring that they compensate employees for work related losses:

> "It is no part of the purpose of this legislation to oppress or add burdens to the business enterprises of the country, but rather to promote the welfare of both employer and employee, by adjusting the losses and injuries inseparable from industry and commerce to the strength of those who in the nature of the case ought to share the burden." Sen.Rep. No. 460, 60th Cong., 1st Sess. 3 (1908).

Act, 9 and 10 Victoria c. 93. *See Michigan Central R. R. Co.* v. *Vreeland,* 227 U.S. 59, 69–72 (1913). By doing so, as this Court held in *Vreeland,* Congress manifested the intention that FELA wrongful death awards are to compensate the specified relatives of the decedent "for the loss and damage resulting to them financially by reason of the wrongful death .... and for that only." *Id.*, at 68, 69–72. This congressional purpose requires that wrongful death recoveries under the FELA be "limited strictly" to the statutory beneficiaries' financial loss. *See Gulf, Colorado, & Santa Fe R. Co.* v. *McGinnis,* 228 U.S. 173, 176 (1913). Consistent with this congressional objective, numerous courts have held that the FELA precludes the award of punitive damages in both wrongful death and personal injury cases. *See, e.g., Kozar* v. *Chesapeake & Ohio Ry. Co.,* 449 F.2d 1238, 1240–43 (6th Cir. 1971); *State ex rel Burlington Northern, Inc.* v. *District Ct.,* 169 Mont. 480, 548 P.2d 1390, 1393–95 (1976).

That these principles of damages are binding on the state, as well as the federal, courts that administer the Act is also clear from the Act's terms and history. The FELA was intended to "supplant" state law and "create uniformity throughout the Union" concerning the extent of a railroad's financial responsibility for injuries to its employees. H. R. Rep. No. 1386, 60th Cong., 1st Sess. p. 3 (1908). Were state courts, in adjudicating the liability of a railroad to its employee, to disregard the restrictions on damages that Congress imposed, it would not only upset the Congressional balance between expanded liability and limited recoveries but would also destroy the desired uniformity. Thus, the question of the proper measure of damages, like all other major incidents of this federal right of recovery,[10] "is inseparably

[10]The "major incidents" of the FELA's right of recovery that are matters of substantive federal law, binding on state courts, are

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connected with the right of action [created by] the Federal Employers' Liability Act," and must be settled according to federal substantive law." *Chesapeake & Ohio R. Co.* v. *Kelly*, 241 U.S. 485, 491 (1916); *see also* Restatement of the Law 2d, Conflict of Law §§171, 178 (1969).

Consistent with the principle that FELA damages must be strictly limited to losses sustained, this Court has, in a wide variety of contexts, reversed state court judgments where the state courts' administration of the Act created a significant risk that the trier of fact would award a sum that would overcompensate the claimant. *Chesapeake & Ohio R. Co.* v. *Kelly, supra*, is illustrative. There, a state trial court had refused to instruct a jury to discount the FELA claimant's lost future pecuniary benefits to their present value, and the state supreme court had affirmed, noting that it was the local state practice not to make such reductions. This Court reversed. Because the jury had been allowed to aggregate future benefits "without taking account of the earning power of the money that [was] presently ... awarded", the plaintiff's verdict was greater in value than the "pecuniary benefits that would have resulted from the continued life of the

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many and varied. *See, e.g., Dice* v. *Akron, Canton, & Youngstown R. R.*, 342 U.S. 359 (1952) (validity of release; allocation of function between judge and jury); *Brady* v. *Southern Ry.* 320 U.S. 476 (1943) (sufficiency of evidence); *see also* Hill, Substance and Procedure in State FELA Actions—The Converse of the Erie problem?, 17 Ohio St. L.J. 384 (1956).

"*North Carolina R.R. Co.* v. *Zachary*, 232 U.S. 248 (1914), establishes that the FELA preempts the state law of damages in cases involving the liability of railroads to their employees. There, the state court had been oblivious to the existence of the FELA and awarded wrongful death damages based on a local law which "seem[ed] not" to limit recovery to the pecuniary losses sustained by specified beneficiaries. *Id.* at 256–257. Because this Court determined that the fatal accident had been covered by the terms of the FELA, the state court judgment was reversed.

deceased" and thus was contrary to the purpose of damages awards under the FELA. *Id.*, at 489. To ensure that such awards not exceed the value of the loss to the claimant, this Court held that all courts administering the FELA must instruct the juries that any damages awarded for lost future benefits must be based on their present value only. *Ibid.*

This standard has been strictly enforced in other decisions of this Court. In *Michigan Central R. R.* v. *Vreeland*, 227 U.S. 59 (1913), for example, the Court reversed the judgment of the state court because the trial court's instructions had not precluded the jury from including in the award an amount for an element that does not represent a financial loss to the decedent's beneficiaries: loss of society and companionship. *Id.*, at 70–74. Similarly, in *Kansas City Southern Ry.* v. *Leslie*, 238 U.S. 599 (1915), the state judgment was reversed because the instructions had allowed the jury to include in the award portions of the decedent's estimated gross earnings which would not have been contributed to the beneficiaries if there had been no accident. *Accord, Gulf, Colorado, & Santa Fe R. Co.*, v. *McGinnis*, 228 U.S. 173 (1913).

These cases and the principles they establish control both of the questions presented here.

II. THE ILLINOIS COURTS' REFUSAL EVER TO PERMIT CONSIDERATION OF THE EFFECT THAT INCOME TAXATION WOULD HAVE HAD ON A DECEDENT'S DISPOSABLE INCOME VIOLATES THE PRINCIPLE THAT DAMAGES NOT EXCEED COMPENSATION FOR CLAIMANT'S LOSS.

The Illinois courts in this case adopted the flat rule that no matter how greatly income taxation would have reduced a decedent's disposable income if there had been no accident, a tribunal may not consider the impact of income taxation on

the decedent's earnings in computing an FELA award. Thus, even though income taxation would have had a substantial and significant effect on decedent's estimated gross earnings, the Illinois courts refused to permit petitioner to place before the jury its evidence of the taxes decedent would have paid. The obvious effect of this ruling was to preclude the jury from deducting the amount of those taxes from its award,[12] and, as a result, the jury included the present value of the tax payments decedent would have made in its award. This violated the federal requirement that courts administering the FELA "strictly limit" wrongful death recoveries to claimants' pecuniary losses.

A. A Reduction For The Income Taxes A Decedent Would Have Paid Is An Essential And Integral Part Of The Determination Of The Value Of His Beneficiaries' Net Pecuniary Loss

A reduction for the taxes the decedent would have paid is an essential and integral part of the determination of the value of the loss to a decedent's beneficiaries.

Because wrongful death awards under FELA are intended to compensate the decedent's beneficiaries for *their* losses, the measure of these recoveries is the amount that the decedent would have *contributed* to those beneficiaries, not the *gross* amount the decedent would have earned over his working life. In determining the value of the beneficiaries' lost receipts, the tribunal thus must deduct from the decedent's gross earnings all those amounts that the decedent would not, or could not, have used to support them. *Kansas City Southern Ry.* v. *Leslie*, 238 U.S. 599 (1915), makes this explicit. There, the state trial court had instructed the jury

[12]Had this evidence been admitted, the decedent's estimated tax liability would have been one of the "deductions" made from gross earnings. *See* A84.

that the damages that decedent's wife and child had incurred as a result of his death would be the present value of the difference between the gross amount the decedent would have earned and his personal expenses. This Court reversed the judgment that had been entered for the plaintiff, holding that the probable result of this instruction was "materially to prejudice" the railroad's "right" to pay out only that amount which the decedent would have contributed to his beneficiaries. *Id.* at 604. Although the state court had recognized—as did the Illinois courts here, *see* p. 7, *supra;* A84—that the FELA required the jury to deduct from decedent's gross earnings the amounts that he would have spent on himself, the instruction failed to require the jury also to deduct from decedent's gross earnings the amounts that the decedent would have paid over to individuals other than the statutory beneficiaries. *Accord, Gulf, Colorado & Santa Fe R. Co.* v. *McGinnis*, 228 U.S. 173 (1913).

The taxes a decedent would have paid on his earnings are simply one example of monies that a decedent could not have used to support his dependents. Just as the FELA requires a deduction from estimated gross earnings for the decedent's personal expenditures and for amounts paid non-beneficiaries, so too it must also require adjustments for the taxes the decedent would have paid. The only amounts decedent could have contributed to anyone would have been taken from his "net earnings after the payment of taxes." *Floyd* v. *Fruit Industries*, 144 Conn. 659, 136 A.2d 918, 922 (1957).[13]

[13]The suggestion that the amount of income tax liability is "collateral" to the issue of what will be a just verdict, *see* Respondent's Opposition to Petition for Certiorari, at 6, ignores that the issue here is the amount of the contributions that the wage earner would have made to his beneficiaries if he had lived. This is no more "collateral" to the issue than is the amount the decedent would have spent on himself. Deductions for both are required to limit the award to the beneficiaries' losses.

To hold, as the Illinois courts have, that the amount of taxes payable on estimated lost earnings can never be an appropriate consideration not only contravenes these established damages principles, but it can confer enormous windfalls. The facts of *British Transport Comm'n* v. *Gourley*, [1956] A.C. 185, 3 All E.R. 796, illustrate the point. There, the trial court had awarded the claimant the sum of £37,720 "in respect of lost earnings actual and prospective" but found that if he had taken into account the taxes which would have been paid if the injured party had actually earned that sum over the period of his disability, the lost earnings component of the award would have been reduced to £6,695. The House of Lords reversed the judgment and held, overruling a number of earlier decisions, that the incidence of taxation must be taken into account in calculating tort damages. To hold otherwise and pretend that "a taxpayer has the benefit of his full income is . . . to be out of touch with reality" and to award the claimant substantially more than he lost. *Id.*, 3 All E.R., at 805 (Lord Goddard).

In so holding, the House of Lords recognized that it would be "fallacious to consider the problem as though a benefit were being conferred on a wrongdoer by allowing him to abate the damages." *British Transport Comm'n* v. *Gourley, supra*, 3 All E.R. at 802 (Earl Jowitt). Not only would no benefit be conferred,[14] but to focus on the defendant's situation is to ignore that the only relevant question is the amount of the loss sustained. The only conceivable justification for requiring a

[14]The argument to the contrary proceeds from the erroneous premise that, because the defendant paid out the decedent's full wages before the accident, the defendant will profit from his wrong if the lost earnings portion of the award is based on after tax earnings. The fallacy of such reasoning is obvious. Before the accident, the employer was paying only for the decedent's services. After the accident, the employer pays "someone else to perform the services" plus the decedent's beneficiaries' loss. *See British Transport Comm'n* v. *Gourley, supra*, 3 All E.R., at 809 (Lord Reid).

railroad to pay out an amount in excess of the loss sustained is some notion that the defendant deserves to be punished. Such a notion has no place in the administration of a law, like the FELA, which is designed to redistribute losses, not to punish wrongdoers,[15] and, indeed, which precludes the award of exemplary damages. *See, e.g., Kozar* v. *Chesapeake & Ohio Ry. Co.*, 449 F.2d 1238, 1240–43 (6th Cir. 1971).

As aptly stated by the Connecticut Supreme Court:

> "It would be difficult to conceive of a more unjust, unrealistic or unfair rule than one which would lead a jury to base their allowance of reasonable compensation for the destruction of earning capacity on the hypothesis that no income taxes would be paid on net earnings." *Floyd* v. *Fruit Industries*, 144 Conn. 659, 136 A.2d 918, 922 (1957).

Numerous other courts and commentators have agreed.[16]

[15]Indeed, because the whole trend in the judicial interpretations of the FELA has been further to dilute the concept of fault so as to ease recovery by accident victims, *see Brown* v. *Western Ry.* 338 U.S. 294 (1949) (presence of clinker of coal in yard is actionable negligence); *see generally*, Alderman, What the Supreme Court Has Done to the Old Law of Negligence, 18 Law & Contemp. Prob. 110 (1953), any notion that FELA defendants are, as a class, blameworthy and worthy of punishment is impossible to maintain. And certainly in the present case, where the act of a vandal was the precipitating cause of the accident, no argument can be made that petitioner's conduct was such that it should be punished.

[16]*See, e.g., LeRoy* v. *Sabena Belgian World Airlines*, 344 F.2d 266, 276 (2d Cir. 1965); *Cox* v. *Northwest Airlines, Inc.*, 379 F.2d 893, 895–96 (7th Cir. 1967); *Burlington Northern Inc.* v. *Boxberger*, 529 F.2d 284, 287–95 (9th Cir. 1975); *Sanchez* v. *Denver & Rio Grande W. R.R.*, 538 F.2d 304 (10th Cir. 1976); *Geris* v. *Burlington Northern Inc.*, 277 Or. 381, 561 P.2d 174 (1977); *Tenore* v. *NU Car Carriers, Inc.*, 67 N.J. 466, 341 A.2d 613, 623–29 (1975); *Adams* v. *Deur*, 173 N.W.2d 100 (Iowa 1969); II F. Harper & F. James, Law of Torts §25.12 (1956); Nordstrom, Income Taxes and Personal Injury Awards, 19 Ohio St.L.J. 212 (1958); Burns, A Compensation Award for Personal Injury or Wrongful Death Is Tax-Exempt: Should We Tell the

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B. There Is No Justification For A Deviation From The Principle Of Compensation

None of the arguments advanced for the rule Illinois adopted in this case is either persuasive or sufficient to justify ignoring the effects of income taxation where, as here, it would have significantly reduced the decedent's disposable income.

1. *The Determination Of The Effect Of Taxation On A Decedent's Lost Earnings Is No More Speculative Than Other Required Components Of Damages Computations.*

The reason that is most often advanced to support the Illinois position is that the predictions and estimates involved in calculating future income tax liability are so speculative and conjectural that they cannot be made part of the process of assessing damages, no matter how great the injustice. *See, e.g., Huddell* v. *Levin*, 395 F.Supp. 64, 88 (D.N.J. 1975). This argument is untenable. The determination of the impact that taxation would have had on a decedent's estimated earnings requires no more—and in many instances far less—speculation than do the other predictions and estimates that a tribunal makes in computing damages.

The basic claim must be assessed in light of the damages computations that our system already requires. The determination of the value of a tort claimant's losses can never be made with mathematical exactitude. *See Cox* v. *Northwest Airlines, Inc.*, 379 F.2d 893, 896 (7th Cir. 1967); *British Transport Comm'n* v. *Gourley, supra*, 3 All E.R., at 803 (Opinion of Earl Jowitt). In large part, this is because the practice of awarding damages for past and future losses in a single lump sum requires the tribunal to make predictions about a number of uncertainties of the future, such as, the trends of any individual's future earnings, future interest rates, or an individual's future family relationships. Indeed, some of the recognized elements of damages cannot reliably be assigned economic values: *e.g.*, conscious pain and suffering.[17]

Against this background, the objection that income taxation is too speculative to be considered by a jury has no merit. The argument, first, has no applicability whatever to the determination of the taxes that would have been paid on *past* lost earnings, *i.e.* those amounts that would have been earned between the accident and the date of trial. The only conjecture with respect to these pertains to what the decedent's earnings would have been for that period, and that the plaintiff must prove. Once past lost earnings are determined, taxes can be computed with the same exactness as though a regular tax return were being filed by the decedent.[18]

As to the taxes on a decedent's projected future earnings, the basis for the objection is that there may be changes in the tax laws that would affect the rate at which that income would have been taxed in the future. But in the view of the fact that personal income taxation has continued in this

Jury?, 14 DePaul L.Rev. 320, 321–26 (1965); Morris & Nordstrom, Personal Injury Recoveries and the Federal Income Tax Law, 46 A.B.A.J. 274 (1960); Stripp & Rowland, Taking Account of the Impact of Income Taxes in Personal Injury and Wrongful Death Cases—Recent Developments, 36 Ins. Counsel J. 231 (1969); Note, 50 Ky.L.Rev. 601 (1962); Note, 56 Minn.L.Rev. 503 (1972); Note, 8 Tulsa L.J. 242 (1972).

[17]Two of the leading authorities on the law of torts have observed that "pain and suffering have no exchange value and there is no attempt to equate them to anything like that." F. Harper & F. James, *The Law of Torts* §25.03, at 1322 (1956).

[18]Accordingly, at least one court has recognized that, even if the evidence of a decedent's future tax liability is not considered, it is error for a court to exclude evidence of *past* tax liability. *See, e.g., Varlack* v. *SWC Caribbean, Inc.*, 550 F.2d 171, 177–178 (3rd Cir. 1977). Because the Illinois courts excluded evidence of past as well as future taxes, the adoption of the rule in *Varlack* would require a reversal here.

country without substantial change, for decades, surely "[n]othing can be more certain than that there will be a federal income tax in the years to come and that it will be substantially what it is now and what it has been for many years." *McWeeney* v. *New York, New Haven & Hartford R. Co.*, 282 F.2d 34, 42 (2d Cir. 1960) (Lumbard, J., dissenting). In any case, estimates as to the future impact of taxation assuredly involve no more conjecture—and indeed involve a good deal less—than do the other predictions that are inherent in any attempt to estimate the value of the contributions a decedent would have made to his dependent relatives if there had been no fatal accident. In this case, for example, respondent's witness Friedman's computation of the pecuniary loss to decedent's wife and children included a number of assumptions about future events: *e.g.*, that had he survived, Liepelt would have lived his entire life expectancy, earned the equivalent of a fireman's wages for the period from 1973 to 2000, and remained married to his second wife (he was divorced from his first wife, *see* A27) for the rest of his life. In view of the possibility of death from natural causes or of a disabling non-compensable injury, and the instability of family relationships, each of these assumptions was a good deal more speculative than would have been a prediction concerning the effect that taxation would have had on those amounts it was projected Liepelt would have earned. And estimates concerning the amount of future taxes clearly would involve far less conjecture than did, for example, permitting the jury in this case to assign a value to the guidance decedent would have provided his children in the future even though plaintiff's own expert witness testified that it was not possible reliably to assign a value to this loss. (A59–A60).

The observation of Professor Harper and James is compelling:

> "[F]uture taxes are no more speculative than many other items that go into prophecies about future losses in this uncertain world of ours—witness the future earnings of a young child or the future trends in the dollar's value. As long as our system stays wedded to the single lump sum recovery, our courts simply have to speculate about the uncertainties of the future. With anything as sure as 'death and taxes' the courts are avoiding their responsibilities when they decline to make the best guess they can, once all the reasonably available evidence is brought before them." II F. Harper & F. James, *Law of Torts* ¶25.12, at 1327 (1956) (footnotes omitted.).[19]

For these reasons, the Court of Appeals for the Ninth Circuit has stated that "there is absolutely no reason why a court cannot admit evidence of the tax payments that a decedent or injured wage earner would have been required to make." *Burlington Northern, Inc.* v. *Boxberger*, 529 F.2d 284, 292 (9th Cir. 1975). *See also Cox* v. *Northwest Airlines Inc.*, 379 F.2d 893, 896 (7th Cir. 1967); *British Transport Comm'n* v. *Gourley, supra*, 3 All E.R. at 806 (Opinion of Lord Goddard).

2. *The Impact Of Income Taxation Can Be Determined As Readily By Judges Or Juries As Other Elements Of An Award.*

A related argument for the flat prohibition Illinois has here adopted is that the computation of income tax liability is too difficult a task for the average juror and would unduly complicate a trial. This is unpersuasive for similar reasons.

The principle that FELA damages be strictly limited to the claimant's pecuniary loss already requires that juries

[19] As one commentator has put it:

> "[Because] plaintiff receives the advantage of speculation in his favor, [courts should not] bar defendant from even trying to show what appears to be a smaller speculation in his favor[.]" Nordstrom, Income Taxes and Personal Injury Awards, 19 Ohio St. L.J. 212, 227 (1958).

make far more difficult computations than those involved in making adjustments for income tax liability. *Chesapeake & Ohio R. Co.* v. *Kelly*, 241 U.S. 485 (1916), establishes the point. There, the Kentucky Court of Appeals refused to require that a jury discount a claimant's lost future pecuniary benefits to their present value because "to figure interest on deferred payments, with annual rests, and reach a present cash value is more than ought to be asked of anyone less qualified than an actuary." *Id.*, at 489. While agreeing that these may be "difficult mathematical computations for the ordinary jury man," this Court reversed. It observed that there were a number of ways to mitigate the difficulties for the jury, including the use of expert testimony, and that, because the Kentucky approach would inevitably overcompensate the FELA claimants, it was imperative that the computations be made. *See id.*, at 491.

Kelly is dispositive. Whatever else may be said about the consideration of income tax liability, it surely presents a far easier task for a jury than does the discounting to present value of future losses or other determinations that juries routinely make in other contexts. Not only would the determination of the tax liability of railroad employees ordinarily involve very manageable computations for laymen, but today's jurors have had personal experience in determining their own income taxes.[20] With the aid of competent expert

[20]According to the most recent statistics available, approximately 70% of the taxpayers in the United States do not itemize deductions, and over 33% use the so-called short form (Form 1040A). *See Internal Revenue Service, Statistics of Income 1976: Individual Tax Returns*, Publication 79 (4-79) pp. 17, 20, 38 (1979). Thus, respondent's implication to the contrary notwithstanding, it would be the unusual case in which juries would have to consider "the type and amount of deductions, the effect of tax exempt earnings, tax shelters, and taxes on investment earnings." Opposition to Petition for Certiorari, at 4. Of course, even in the rare case in which such items are

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testimony, juries surely are as equal to this task as to the other more complex aspects of determining the proper awards. *See Burlington Northern, Inc.* v. *Boxberger*, *supra*, 529 F.2d at 293.

Nor is there any merit to the related suggestions that consideration of income tax liability would convert the trial of a negligence action into a tax case, and divert the jury from the true issues of the case. *See Frankel* v. *United States*, 321 F. Supp. 1331, 1349 (E.D. Pa. 1970), *aff'd* 466 F.2d 1226 (3d Cir. 1972). It would be the unusual case in which any income tax questions would be other than the simplest variety, *see* n. 20, *supra*, and there is no reason why consideration of the effects of income taxes could not be integrated into the testimony concerning the extent of pecuniary loss. For example, in the present case, plaintiff's expert witness Friedman could readily—without lengthening the trial at all—have testified concerning the amount of the decedent's estimated income taxes immediately before making the allowance for personal expenses. The issue of the impact of taxes is no more likely to dominate the proceedings than are any of the other questions that can affect the size of the verdict, such as the interest rate to be used in discounting the award to its present value, or the amount of the allowance for personal expenses.

In short, as the New Jersey Supreme Court has stated, the consideration of income taxation will surely not present any "insurmountable problems for the trial courts or juries." Because damages are to be compensatory only, "simplicity [cannot be given] paramount importance in fashioning the law of damages. Such an approach might aid the judiciary, but hardly justice." *Tenore* v. *NU Car Carriers, Inc.*, 67 N.J. 466, 341 A.2d 613, 628 (1975).

present, a jury would, with the aid of expert testimony, have no more difficulty determining tax liability than it would have in determining other elements, *e.g.*, the amount of a decedent's personal expenses.

3. *Ignoring Income Taxation Cannot Be Justified As An Offset Either For Inflation Or For Attorney Fees.*

A further argument for failing to make adjustments for income taxation is that its effects are offset by factors jurors do not consider: future inflation and attorney fees. The former has no application here, for the award implicitly included an adjustment for inflation.[21] The latter is simply irrelevant to the measure of FELA damages, as numerous courts have held. *See, e.g., Counts* v. *Thompson*, 359 Mo. 485, 222 S.W.2d 487, 494 (1949); cf. *Ritter* v. *Ritter*, 381 Ill. 549, 46 N.E.2d 41 (1943).

The American rule is that, unless a statute otherwise provides, courts may not require the losing party in a lawsuit to reimburse the prevailing party for any portion of his attorney fees. *See Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240, 247–71 (1974). This rule is absolute in its nature and may not be circumvented by allowing or requiring the jury to include in a damages award amounts that are not necessary to compensate the claimant for his loss, but that will reimburse him for attorney fees. *Arcambel* v. *Wiseman*, 3 U.S. (3 Dall.) 306 (1796), quoted with approval in *Alyeska Pipeline Co.* v. *Wilderness Society, supra*, 421 U.S. at 249–52.[22]

But even if it were permissible for the judiciary to reallocate the burdens of litigation in FELA cases in the absence

[21]The predicted annual increase in Liepelt's future wages reflected the effects of inflation. *See* A48.

If inflation had not been taken into account here, the remedy would lie in making future inflation a relevant consideration, not in refusing to allow the jury to consider factors, such as income taxes, that directly and substantially affect the pecuniary loss actually sustained by an FELA claimant.

[22]The Ninth Circuit has further stated:

> "Attorneys' fees simply are not relevant in the calculation of what the plaintiff would have received if the decedent had

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of an explicit legislative directive, a refusal to make adjustments for income taxes would be an altogether capricious and haphazard means of doing so. Individuals in low tax brackets would only be awarded a fraction of their fees whereas those in higher brackets would recover the entire amount of their fees, and then some. If the law's failure to permit the prevailing party to recover attorney fees falls short of desirable social policy, the solution should lie in a uniform and well thought out change in the law, and not in the caprice of permitting claimants to recover for elements, like the amount of their decedent's taxes, that bear no relation to either their actual losses or their litigation expenses. *Cf.* II F. Harper & F. James, *Law of Torts*, ¶25.22, at 1348 (1956).[23]

> survived, and it would be no more logical to remind the jury that plaintiff will pay attorneys' fees, in hopes that the award might be increased, than to remind the jury that the defendant will have the additional expense of paying his attorneys, in hopes that the jury will be influenced to decrease the award. Attorneys' fees are related to private contracts between the litigants and the attorneys. They have no legitimate relevancy to the issue as to what amount of money is justly compensatory for the loss resulting from the defendant's tortious act." *Boxberger* v. *Burlington Northern, Inc., supra*, 529 F.2d at 294.

[23]A final justification that has been advanced for the Illinois rule is that 26 U.S.C. §104(a)(2)'s exclusion from taxable income of "damages received . . . on account of personal injuries" has impliedly repealed the FELA rule limiting damages to the value of the claimant's losses. However, there is nothing in §104(a)(2)'s terms or history that even begins to suggest it requires the overcompensation of tort claimants. Not only did Congress not enact §104(a)(2) with the purpose of conferring any such economic benefits, *see* H. R. Rep. No. 767, 65th Cong., 2d Sess. 9–10 (1918), 20 Treas. Dec. Int. Rev. 457 (1918), but the terms of §104(a)(2) preclude the conclusion that it could affect the measure of personal injury judgments. It provides only that a plaintiff is exempt from paying income tax on the "damages received." The statute, quite simply, cannot be read as prescribing the elements to be used in calculating

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C. The Refusal Of The Illinois Courts To Admit The Evidence Of Decedent's Estimated Income Tax Liability Requires Reversal

In sum, none of the arguments advanced for Illinois' rule even begin to support a rule allowing tribunals to disregard the effects of income taxation in computing FELA awards. As the Ninth Circuit has stated, "fairness and logic ... require a rule providing for the admissibility of evidence of, and corresponding deduction to account for, future income taxes in *all* cases." *Burlington Northern, Inc.* v. *Boxberger*, 529 F.2d 284, 294 (9th Cir. 1975) (emphasis in original); *accord*, *Tenore* v. *NU Car Carriers, Inc.*, 67 N.J. 466, 341 A.2d 613, 628 (1975) (wrongful death); *Adams* v. *Deur*, 173 N.W.2d 100, 105 (Iowa, 1969) (same).

Some courts that have refused absolutely to prohibit any consideration of income taxation have held that inquiry into the impact of taxation is only required when there is reason to believe that income taxation would have significantly or

the *amount* of those damages. It merely says that after the proper measure of damages has been used to determine the size of the award, the award itself will not be subject to a tax.

Moreover, even if this argument were otherwise valid, it would have no applicability to this case, for §104(a)(2) does not apply to wrongful death awards. Although such awards are not taxable, the reason, as the Internal Revenue Service has twice held, is that wrongful death awards are not income within the meaning of 26 U.S.C. §61, not that §104(a)(2) exempts them from taxation. *See* Rev. Rul. 54-19, 1954-1 Cum. Bull. 179; VII-27-3788, I.T. 2420, VII-2 Cum. Bull. 123 (1928). These holdings follow from the fact a wrongful death award under the FELA is a substitute not for income that would have been earned, but rather for the contributions dependent relatives would have received from the decedent. Because dependent relatives do not realize income as a result of being supported, a wrongful death award does not replace lost income and thus could never be taxable as such. *Cf. Hort* v. *Commissioner*, 313 U.S. 28, 31 (1941).

substantially reduced a decedent's disposable income. *See, e.g., LeRoy* v. *Sabena Belgian World Airlines*, 344 F.2d 266, 276 (2d Cir. 1965); *Cox* v. *Northwest Airlines, Inc.*, 379 F.2d 893, 895–96 (7th Cir. 1967); *Sanchez* v. *Denver & Rio Grande W. R.R.*, 538 F.2d 304 (10th Cir. 1976); *cf. McWeeney* v. *N.Y., N.H. & H. R.R. Co.*, 282 F.2d 34, 38 (2d Cir. 1960). Even this intermediate approach would dispose of this case—and indeed of nearly every FELA case.[24] Not only do decedent's projected future earnings ($16,800 to $51,600)[25] fall within the dollar range in which inquiry into the effects of taxation is mandatory, *see Burlington Northern, Inc.* v. *Boxberger, supra*, 529 F.2d at 290 (summarizing cases), but petitioner's offer of proof here showed that consideration of income taxes would have significantly affected the size of the judgment. To reverse the judgment in this case, therefore, this Court need only hold that it is impermissible to ignore a decedent's estimated income tax liability in computing FELA wrongful death damages where, as here, the impact of taxation is shown to be significant.

[24]The wages of railroad workers have increased steadily over the past two decades, and have now attained a level where income taxation will have a significant effect both on those earnings and upon any projected increases in them. In 1977, for example, the annual average wages for various categories of non-operating railroad employees ranged from $13,208 to $22,447, *see* National Railway Labor Conference, Wage Statistics, Annual 1977, Non-Operating Employees, p. 3 (1978), and for operating employees, like decedent, the annual average wages in 1977 for the various categories of railroad laborers ranged from $16,373 to $29,154.04. *See* National Railway Labor Conference, Wage Statistics, Annual 1977, Operating Employees, p. 4 (1978).

[25]The focus is upon lost *future* earnings because there is no practical problem with the determination of the effect of taxation on lost past earnings. *See* p. 25 and n. 18, *supra*.

III. THE REFUSAL OF THE ILLINOIS COURTS TO ALLOW THE JURY TO BE TOLD THAT ITS AWARD WAS NOT TAXABLE CONSTITUTED A SEPARATE AND WHOLLY INDEPENDENT VIOLATION OF THE REQUIREMENT THAT COURTS STRICTLY LIMIT FELA DAMAGES TO LOSSES SUSTAINED

The second question presented in this case arises because the courts below refused to permit the jury to be advised that any damages it awarded would be free of taxation to respondent.[26] Although this question is not unrelated to the first, it presents an entirely distinct claim of error.[27] Petitioner's claim here is that by refusing to permit the jury to be advised of the nontaxable character of its award, the Illinois courts created a significant and unjustifiable risk that the jury would award not only the amount of the loss suffered by decedent's wife and children as a result of his death, but also,

[26]Wrongful death awards are not income within the meaning of §61 of the Internal Revenue Code and hence are not taxable to the recipient. *See* Rev. Rul. 54-19, 1954-1 Cum. Bull. 179.

[27]The following example illustrates why the two issues here presented are analytically distinct. Assume that the lost future earnings of a decedent were $100,000 per year, that his tax liability on those earnings would have been $40,000, and that, but for the accident, he would have worked one additional year, so that the amount of actual damage would be $60,000 (ignoring personal expenditures). Regardless of how "lost earnings" is measured in this example, a failure to advise the jury of the nontaxable character of its award will create the wholly independent risk that the jury will assume the award taxable and award the plaintiff an additional amount to compensate for an imaginary tax. For example, had the jury followed a gross earnings test in this hypothetical, it might have awarded $100,000, which would have represented a double tax windfall of $40,000 for the taxes on lost earnings and $40,000 for

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in addition, the amount of taxes that would have been payable on the award if it were taxable.

The rule in Illinois is that it is never proper for a jury to be told, "either by oral argument or by written instructions," that its award will not be subject to taxation. *See Hall* v. *Chicago & North Western R. Co.*, 5 Ill.2d 135, 125 N.E.2d 77, 86 (1955); *accord, Raines* v. *New York Central R.R. Co.*, 51 Ill. 2d 428, 430, 283 N.E.2d 230 (1972). Accordingly, the trial court in this case refused even to consider instructing the jury that its award would be tax free and that no amounts should be added to it on account of taxation. (A82, A87). This Illinois rule is clearly contrary to the principle that FELA damages must be strictly limited to losses sustained. As numerous courts have held, trial courts must, at the very least, have the discretion to instruct the jury that awards are not taxable.[28] Indeed, because the benefits of such an instruction are so clear and the risks associated with giving it so minimal, other courts—and nearly every commentator that has considered the matter[29]—take the position that this

the "taxes" on the award. But had it followed a net earnings test, the jury still might have awarded a tax windfall, albeit a single one, for it might have returned a verdict of $84,000, $60,000 for the lost contributions and $24,000 for the imagined tax on the award.

In view of the distinct risks involved, it is not surprising that the courts that require instructions on non-taxability of the award include some that require a "gross earnings" measure of lost earnings, *see, e.g., Domeracki* v. *Humble Oil & Refining Co.*, 443 F.2d 1245, 1248–52 (3rd Cir. 1971), as well as some that have adopted a "net earnings" rule. *See, e.g., Burlington Northern, Inc.* v. *Boxberger, supra*, 529 F.2d, at 295–297.

[28]*See, e.g., McWeeney* v. *New York, N.H., & H.R.R. Co.*, 282 F.2d 34, 39 (2nd Cir. 1960); *New York Central R.R. Co.* v. *Delich*, 252 F.2d 522, 527 (6th Cir. 1958); *Nichols* v. *Marshall*, 486 F.2d 791, 794 (10th Cir. 1973); Annot., 63 A.L.R.2d 1393, 1398 (1959), and later cases in A.L.R. Supp. Service.

[29]*See* II F. Harper & F. James, Law of Torts §25.12, at 1327–28

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instruction must be given wnenever the defendant requests it. *See Burlington Northern, Inc.* v. *Boxberger*, 529 F.2d 284, 295–297 (9th Cir. 1975); *Domeracki* v. *Humble Oil & Refining Co.*, 443 F.2d 1245, 1248–52 (3rd Cir. 1979); *Tenore* v. *NU Car Carriers, Inc.*, 67 N.J. 466, 341 A.2d 613, 629 (1975); *Dempsey* v. *Thompson*, 363 Mo. 339, 251 S.W.2d 42 (1952). On the particular facts of this case, the failure to give this instruction created a definite and significant risk that the jury overcompensated the respondent.

Because damages under the FELA must be "strictly limited" to the value of the losses sustained, instructions given in FELA cases may not allow the jury to base any portion of its award on an improper element. *Michigan Central R. R.* v. *Vreeland*, 227 U.S. 59 (1913), establishes the point. There, the trial court had, correctly, instructed the jury that it could not award any damages to decedent's widow for her grief and sorrow, and that they should "confine themselves to a proper compensation for the loss of any pecuniary benefit."

(1956); Burns, A Compensation Award for Personal Injury or Wrongful Death is Tax-Exempt: Should We Tell the Jury?, 14 DePaul L.Rev. 320 (1965); Feldman, Personal Injury Awards: Should Tax Exempt Status Be Ignored?, 7 Ariz.L.Rev. 272 (1965); Henderson, Some Recent Decisions on Damages: With Special Reference to Questions of Inflation and Income Taxes, 40 Ins. Council J. 423 (1973); Morris, Should Juries in Personal Injury Cases Be Instructed that Plaintiff's Recoveries Are Not Income With the Meaning of the Federal Tax Law?, 3 Defense L.J. 3 (1958); Morris & Nordstrom, Personal Injury Recoveries and the Federal Income Tax Law, 46 A.B.A.J. 274 (1960); Nordstrom, Income Taxes and Personal Injury Awards, 19 Ohio St.L.J. 212 (1958); Stripp & Rowland, Taking Account of the Impact of Income Taxes in Personal Injury and Wrongful Death Cases, Recent Developments, 36 Ins. Council J. 231 (1969); 26 Ford. L.Rev. 98 (1957); 42 GeoL.J. 149 (1953); 50 Ky.L.J. 601 (1962); 44 Ky.L.J. 384 (1956); 56 Minn. L.Rev. 503 (1972); 33 Ohio St.L.J. 972 (1973); 32 Tex. L.Rev. 108 (1953); 25 U.Cin.L.Rev. 385 (1956); 9 Vand.L.Rev. 543 (1956); 11 Wash. & Lee L.Rev. 66 (1954).

Id., at 72. However, it further instructed the jury that it could consider, "draw[ing] upon [their] experiences as men . . . what it would have reasonably been worth to [the widow] in dollars and cents to have had . . . the care and advice of her husband." *Id.*, at 73. Although adherence to the literal terms of this instruction, taken as a whole, would not necessarily have resulted in an award based on improper elements, *see id.*, at 74, the Court set aside the award because the instructions did not preclude the jury from considering one improper element: "the value of the widow's loss of society and companionship of her husband." *Ibid; accord, Kansas City Southern Ry.* v. *Leslie*, 238 U.S. 599 (1915) (verdict reversed because instruction did not prohibit jury from including in award amounts decedent would have paid over the third parties); *Gulf, Colorado & Santa Fe R. Co.* v. *McGinnis*, 228 U.S. 173 (1913) (same). In recognition of the need to eliminate any risk that jurors will award any amounts for the grief or loss of society and companionship, Illinois courts, in FELA wrongful death cases, now routinely—as the trial court did here, *see* A84—instruct juries that they are not permitted to award any amounts for these factors. *See* Illinois Pattern Jury Instructions, Civil, Federal Employers' Liability Act (IPI), §160.15 (2nd Ed. 1971).

These principles compel the reversal of the decision below. It clearly would have been a flagrant violation of FELA for respondent here to have been awarded not only the value of decedent's beneficiaries' loss but also, in addition, the amount of taxes that would have been payable on the award if the award were taxable. Yet, by refusing to permit the jury to be told that its award would be tax free, the trial court created a significant risk that the jury inflated the award to include the amount of such an imagined tax.

Judicial notice is routinely taken of the way in which ours has become a tax conscious society. *See, e.g., Burlington Northern,*

Inc. v. *Boxberger*, *supra*, 529 F.2d at 297. Not only does nearly every wage earner in the United States pay out a substantial percentage of his wages in taxes, but public attention is constantly being focused upon the fact that nearly every receipt of money creates a "taxable event." *Domeracki* v. *Humble Oil & Refining Co.*, 443 F.2d 1245, 1251 (3rd Cir. 1971). By the same token, because few members of the general public are aware of the rule that wrongful death or personal injury awards are exempt from taxation, "it is reasonable to assume the average juror would believe [its award will] be subject to such taxes." *Dempsey* v. *Thompson*, 363 Mo. 339, 251 S.W.2d 42, 45 (1952).

That a jury's views concerning the taxability of its award could affect its determinations of damages is illustrated by the reported instances in which juries, after having been fully instructed by the court, have asked the judge whether the award is taxable. *See, e.g., Spencer* v. *Martin K. Eby Constr. Co.*, 186 Kan. 345, 350 P.2d 18, 21 (1960); Knachel, Jury Instructions on Tax Exemptions in Personal Injury Cases, 6 Cleve. Mar.L. Rev. 71, 74 (1957). The reasons juries make such inquiries is self-evident. The jury will always be instructed—as it was here, *see* A83—to fix the amount of money which will reasonably and fairly compensate the survivors of the decedent for their pecuniary loss. Under the terms of such instructions, the jury could reasonably believe that it was its duty to ensure that respondent would receive the amount of *disposable* income that would fully compensate the decedent's survivors for their losses.

Thus, when the jury is not told that the award is not taxable, but concludes that it is its obligation to ensure full "after-tax" compensation, it will assume the award is taxable and add an amount to it to ensure full compensation to the claimants after payment of the imagined tax. And it appears

that precisely this occurred in the case at bar. Here, respondent's expert witness testified that the present value of the net pecuniary loss to decedent's beneficiaries was $302,000, yet the jury returned a verdict of $775,000. Respondent had also sought damages for lost guidance to decedent's children, and the value of that loss was not included in her expert witness's figure. However, it is difficult to imagine a jury awarding $573,000 for the latter, while only $302,000 for the former. The most likely explanation for the verdict is that this jury settled on an award substantially less than $775,000 but believing plaintiff would be taxed, inflated the award to ensure full "after tax" compensation.

Whatever the validity of this explanation, what is determinative here is that the only way to have eliminated the risk that a verdict would have been so inflated would have been to allow the jury to be advised that its award would be tax free. By refusing either to instruct the jury to this effect or to permit petitioner itself to place this fact before the jury, the Illinois courts created that same sort of risk that an award would be based on an improper element as compelled the reversals in *Michigan Central R.R. Co.* v. *Vreeland*, *supra* and *Kansas City Southern Ry.* v. *Leslie*, *supra*.

The arguments that have been advanced to support Illinois' refusal to permit juries to be told that awards are not taxable are singularly unpersuasive. The assertion that to inform juries that its award is tax free would "giv[e] rise to conjecture and speculation," *Hall* v. *Chicago & North Western Railway Co.*, *supra*, 125 N.E.2d at 86, is simply untenable. The sole effect of the instruction would be to inform the jury that it should not make any addition for taxes on the award. It would simplify the jury deliberations by eliminating, not adding, a possible subject for speculation.

The second argument advanced is that to give this instruction is to assume, contrary to established principles, that the jury may misapprehend the instructions concerning the elements of recoverable damages. *Hall* v. *Chicago & North Western Railway Co.*, *supra*, 125 N.E.2d, at 85. This argument reduces to the absurdity that the courts should not afford juries any meaningful guidance as to the elements of damages. All that would be required "is to tell a jury to reach a 'just' verdict and assume that it will do so." Morris & Nordstrom, Personal Injury Recoveries and the Federal Income Tax Laws, 46 A.B.A.J. 274, 275 (1960). Not only is this notion contrary to whole object of jury instructions, it violates the FELA's requirement that the court take affirmative steps to "confine" the jury to consideration of the proper elements of recovery. *See Michigan Central R.R. Co.* v. *Vreeland*, 227 U.S. 59, 72 (1913).

A final argument that has been advanced is that to require that the jury be told that the award is not taxable would inevitably require the giving of a multitude of instructions concerning the elements of damages, including, for example, "that the fees of plaintiff's attorneys are not recognized as an element of damages" and "that the defendant can deduct any award it pays from its income and excess profits tax return." *Hall*, *supra*, 125 N.E.2d, at 86. But acceptance of petitioner's position would not even remotely support the giving of either these, or any similar, instructions. What distinguishes the nontaxability instruction is that, if it is not given, there is an unacceptably high risk that the jury will overcompensate the claimant but that, by giving the instruction, that risk is eliminated altogether. In contrast, the sole effect of giving either of the two hypothetical instructions would be to invite the jury to base its awards on improper considerations such as the amount of plaintiff's litigation expenses or the cost to the defendant of paying an award.

In short, there is no reason whatsoever not to have given the nontaxability instruction. "The benefits of informing the jury of the true consequences are so clear, and the burden in terms of time and the possibility of confusion so minimal that the balance . . . overwhelmingly . . . favor[s] giving such an instruction." *Burlington Northern Inc.* v. *Boxberger*, 529 F.2d 284, 297 (9th Cir. 1975); *accord*, *Domeracki* v. *Humble Oil & Refining Co.*, 443 F.2d 1245, 1251 (3rd Cir. 1971); *Tenore* v. *NU Car Carriers, Inc.*, 67 N.J. 466, 341 A.2d 613, 629 (1975); *Dempsey* v. *Thompson*, 363 Mo. 339, 251 S.W.2d 42 (1952). And, on the facts of this case, the failure to give the instruction (or to permit the petitioner to place the fact of the nontaxability of the award into evidence) so increased the likelihood that the jury would focus on an improper element in computing claimant's damages that the refusal constituted an entirely independent ground for reversing the judgment of the lower court. *Michigan Central R. R. Co.* v. *Vreeland*, *supra*; *Kansas City Southern Ry.* v. *Leslie*, *supra*.

CONCLUSION

For the foregoing reasons, the judgment of Illinois Appellate Court, First District, First Division, should be reversed.

Respectfully submitted,

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